TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 818.

THE DAVIS AND RANKIN BUILDING AND MANUFACTURING COMPANY, PLAINTIFF IN ERROR,

vs.

WILLIAM W. BARBER ET AL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

FILED OCTOBER 11, 1894.

(15,702.)

(15,702.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 818.

THE DAVIS AND RANKIN BUILDING AND MANUFACTURING COMPANY, PLAINTIFF IN ERROR,

vs.

WILLIAM W. BARBER ET AL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

INDEX.

	Original.	Print.
Citation	*a*	1
Acceptance of service of citation	*b*	1
Writ of error	*c*	1
Caption	1	3
Complaint	2	3
Exhibit Contract	4	4
Answer of Davis & Rankin	8	9
Demurrers	9	10
Judgment	10	10
Opinion	10	11
Petition for writ of error	17	15
Assignment of errors	17	15
Order approving bond and allowing writ of error	17	15
Bond on writ of error	17	16
Clerk's certificate	19	16

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 1, 1894.

a UNITED STATES OF AMERICA, *ss:*

To William W. Barber, William Bevis, Edgar Coffey, William Wallace Brill, H. C. Wilson, Jacob Baumunk, G. D. Coble, J. P. Ell, M. C. Moss, Emanuel Deeter, William Miller, Jayson W. Brown, J. E. Johnson, Hardy Hicks, A. L. Kauble, Henry F. Weber, Henry Schoppenhorst, William M. Mitchell, J. D. Stoneburner, John C. Long, A. Baumunk, J. P. Romas, Christian Baumunk, Perry Whitecotton, R. Gantz, M. E. Baumunk, William M. Nicoson, P. O. C. Tyler, F. N. Moderitt, Perry S. Whitecotton, J. C. Goble, George C. Hoffman, Jacob Fogel, Pat. Goggen, Lewis Backtisch, Nathan Wood, O. O. Van Cleve, Jonathan Beeson, William Minor, Hiram Gilbert, Edwin Miller, S. H. Chad, H. H. Long, John Everwine, L. W. Gibbons, George Payton, Robert Tuttle, Alba Long, Joseph H. Hopkins, William Helton, I. N. Nicoson, Robert Davis, D. M. Barnhart, E. O. Hopkins, John C. Mitchell, Charles Siples, Jacob Mitchell, W. H. Evans, B. F. Spelbring, Levi Binford, and Z. T. Barnett, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington 30 days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the circuit court of the United States for the district of Indiana, wherein The Davis & Rankin Building & Manufacturing Company is plaintiff and you are defendant- in error, to show cause, if any there be, why the judgment mentioned should not be corrected and speedy justice should not be done to the parties in this behalf.

Seal Circuit Court of the United States, District of Indiana.

Witness the Honorable John H. Baker, judge of the district court of the United States for the district of Indiana and *ex officio* judge of said circuit court, this 14th day of April, 1894.

JOHN H. BAKER, *Judge.*

b We acknowledge service of the within citation this 14th day of April, 1894.

GEO. A. KNIGHT,
J. A. McNUTT,
Att'ys for Def'ts in Error.

c UNITED STATES OF AMERICA:

The President of the United States of America to the judges of the circuit court of the United States for the district of Indiana, Greeting:

Because on the record and proceedings as also on the rendition of a judgment in a plea which is in the said circuit court, before you,

between Davis & Rankin Building & Manufacturing Company and William W. Barber, William Bevis, Edgar Coffey, William Wallace Brill, H. C. Wilson, Jacob Baumunk, G. D. Coble, J. P. Ell, M. C. Moss, Emanuel Deeter, William Miller, Jayson W. Brown, J. E. Johnson, Hardy Hicks, A. L. Kauble, Henry F. Weber, Henry Schoppenhorst, William M. Mitchell, J. D. Stoneburner, John C. Long, A. Baumunk, J. P. Romas, Christian Baumunk, Perry Whitecotton, R. Gantz, M. E. Baumunk, William M. Nicoson, P. O. C. Tyler, F. N. Moderitt, Perry S. Whitecotton, J. C. Goble, George C. Hoffman, Jacob Fogel, Pat. Goggen, Lewis Backfisch, Nathan Wood, O. O. Van Cleve, Jonathan Beeson, William Minor, Hiram Gilbert, Edwin Miller, S. H. Chad, H. H. Long, John Everwine, L. W. Gibbons, George Payton, Robert Tuttle, Alba Long, Joseph H. Hopkins, William Helton, I. N. Nicoson, Robert Davis, D. M. Barnhart, E. O. Hopkins, John C. Mitchell, Charles Siples, Jacob Mitchell, W. H. Evans, B. F. Spelbring, Levi Binford, Z. T. Barnett, a manifest error hath happened, to the great damage of the said Davis & Rankin Building & Manufacturing Co., as by *his* complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid on this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the — day of —— next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court this 16th day of February, A. D. 1894.

Seal Circuit Court of the United States, District of Indiana.

NOBLE C. BUTLER, *Clerk*.

1 Pleas of the circuit court of the United States within and for the district of Indiana, begun and holden at the United States court-house, in the city of Indianapolis, in said district, on the first Tuesday of May, in the year of our Lord one thousand eight hundred and ninety-two, before the Honorable John H. Baker, judge of the district court of the United States for the district of Indiana and *ex officio* judge of said circuit court.

DAVIS & RANKIN BUILDING & MANUFACTURING COMPANY *vs.* WILLIAM W. BARBER, WILLIAM BEVIS, H. C. WILSON, Edgar Coffey, William Wallace Brill, Jacob Baumunk, G. D. Coble, J. P. Ell, M. C. Moss, Emanuel Deeter, William Miller, Jayson W Brown, J. E. Johnson, Hardy Hicks, A. J. Kauble, Henry F. Weber, Henry Schoppenhorst, William M. Mitchell, J. D. Stoneburner, John C. Long, A. Baumunk, J. P. Romas, Christian Baumunk, Perry Whitecotton, E. Gautz, N. E. Baumunk, William M. Nicoson, P. O. C. Tyler, F. N. Moderitt, Perry S. Whitecotton, J. C. Goble, George C. Hoffman, Jacob Fogel, Pat. Goggen, Lewis Backfisch, Nathan Wood, O. O. Van Cleve, Jonathan Beeson, William Minor, Hiram Gilbert, Edwin Miller, S. H. Chad, H. H. Long, John Everwine, L. W. Gibbons, George Payton, Robert Tuttle, Alba Long, Joseph H. Hopkins, William Helton, I. N. Nicoson, Robert Davis, D. M. Barnhart, E. O. Hopkins, John C. Mitchell, Charles Siples, Jacob Mitchell, W. H. Evans, B. F. Spelbring, Levi Binford, Z. T. Barnett, and Davis & Rankin.	No. 8744. Civil Action.

Be it remembered that heretofore, to wit, at the November term, 1891, of said court, on the 22d day of April, 1892, before the Honorable William A. Woods and the Honorable John H. Baker, judges of said court, the following proceedings in the above-entitled cause were had, to wit:

Comes now the plaintiff, by J. B. Cockrum and Shirts & Kilbourne, its attorneys, and files its complaint herein in the words following, to wit:

2 The plaintiff, Davis & Rankin Building & Manufacturing Company, is a corporation organized under the laws of the State of Illinois, having its principal office at the city of Chicago, in the State of Illinois, and is a citizen of the State of Illinois.

Each of the defendants herein except the defendants Davis & Rankin is a citizen of the State of Indiana, and the said Davis & Rankin are, at the time of the execution of the contract herein mentioned were, have ever since been, and still are citizens of the State of Illinois.

And thereupon the plaintiff, complaining of the defendants

herein, says that on the 20th day of July, 1891, the defendants Davis & Rankin, who then were partners in the business of manufacturing and constructing for sale butter and cheese factories and creameries, and the other defendants herein entered into a written contract, a copy of which is filed herewith as part hereof, marked Exhibit "A," by the terms of which, among other things, the said Davis & Rankin agreed to build, erect, complete, and equip for their said codefendants herein a combined butter and cheese factory at or near Saline City, in the county of Clay and State of Indiana, of the size, proportion, and character as particularly set forth in said contract.

The said defendants other than said Davis & Rankin were, by the terms of said contract, to select and furnish suitable lands for such building, together with well, spring, or reservoir on said lot for the use of said business, and on failure so to do within ten days after the execution of said contract, then said Davis & Rankin, at their option, might select and furnish such land and water in behalf and at the expense of said subscribers.

3 When said factory was completed said parties were to pay therefor, by the terms of said contract, $1,500.00, payable in cash when the factory was completed, or one-half cash and the balance in 90 days, with secured notes bearing 6 per cent. interest from date.

Afterwards the plaintiff company was organized for the purpose, among other things, of carrying on the said business which had before that time been carried on by the said Davis & Rankin, and all the business and contracts and property of the said Davis & Rankin became merged in the business and property of the plaintiff as part thereof, and the said Davis & Rankin assigned all their interest in the contract above mentioned to the plaintiff, since which time they have had no interest whatever therein, and they are therefore made parties hereto to answer as to any interest they may have or claim on account of the matters herein complained of.

Pursuant to the terms of said contract the plaintiff proceeded in good faith on its part to carry out the same, made preparations therefor, procured the necessary material and machinery by manufacture and purchase and otherwise in order to fulfil said contract according to its terms, sublet the contract for the foundation for said building, and expended a large amount of money in and about the completion of said building in the way of expenses and salaries of their agents in connection therewith, in the purchase of material, and in obligations to subcontractors, as above mentioned, and in time spent by the employees of the plaintiff and in railroad fare and expenses in going to and from the city of Chicago to such place where the building was to be erected and on account of various other sums for expenses and time and material and obligations, in all for more than the sum of $2,500.00, when, with-

4 out any fault whatever on the part of the plaintiff and without any cause whatever, the defendants except Davis & Rankin refused to carry out and fulfil the contract on their part and refused to permit the plaintiff to proceed further with the exe-

cution of said contract on its part and notified the plaintiff to desist from so doing and notified the plaintiff that it would not carry out the said contract on its part nor would it pay for said building if it should be completed nor any part thereof, all without any cause whatever for so doing.

On account of the said wrongful conduct of said defendants the plaintiff has become absolutely liable to pay the said subcontractor for said foundation, to wit, the sum of $150.00, and the said items of expense and loss of time and damage on account of materials; machinery, as above specified, has been wholly lost to the plaintiff, and also on account of the conduct aforesaid the plaintiff has entirely lost all of its profits which it would otherwise have become entitled to on the completion of said contract, on account of all which the plaintiff has been damaged by said wrongful conduct and breach of contract in the sum of $4,500.00, which is due and remains wholly unpaid.

Wherefore the plaintiff sues and demands judgment in the sum of $4,500.00 and for all other proper relief.

By J. B. COCKRUM.
SHIRTS & KILBOURNE,
Att'ys for Plaintiff.

Contract and Specifications for a Combined Butter and Cheese Factory on the Cooperative and Farmers' Protective System.

5 We, Davis & Rankin, party of the first part, hereby agree with the undersigned subscribers hereto, party of the second part, to build, erect, complete and equip for said party of the second part, a combined butter and cheese factory, at or near Saline City, Indiana; as follows, to wit:

The factory building proper shall be thirty-two feet wide and 52 feet long, by twelve feet high. Said building to rest upon stone walls as described in specifications hereon.

Said factory building proper is to be one story high, and divided into 7 rooms as shown on working plan, viz: a manufacturing-room, water, refrigerator or cold-storage room, cheese-curing room, office, boiler and engine room, receiving-room and shipping-room.

Said factory shall be equipped with the following outfit to wit:

One eight-horse-power engine, with twelve-horse-power upright boiler, complete, with inspirator and smoke-stack; one heating coil for cheese-curing room, also cold-air-register connection from refrigerator to more perfectly control the temperature; one centrifugal separator capable of separating 2,000 pounds of milk in one hour; one 300-gallon Fairlamb cream vat; one 600-gallon milk-heating vat; one improved radiator rake vat of 500-gallon capacity; one revolving box churn of 300 gallons; one covered crank suction and force pump; one 300-pound tempering tank for separator; one Fairlamb power butter-worker, center drip; one power combination revolving worker curd sink; one single-gang cheese press; fourteen iron cheese hoops; one 600-pound milk-receiving can; one 400-pound milk scales;

COPY.

one 600-pound five-beam platform scales; one steam washing and cleansing tank; one large water tank for supplying boiler, milk vats, churns, etc.; racks and shelves in curing-room for curing cheese; water and steam pipes connecting with boiler; also one lactometer; one siphon and strainer; two curd knives; six milk-testing graduates; one druggists' graduate; one milk-conductor; two side pails; one dairy thermometer; one strainer dipper; one butter-tryer; one cheese-tryer; one salt sieve; one belt punch; 25 feet rubber hose; office desk and chair; one 60-patron mill book; also belting, shafting, shaft collars, shaft hangers, pulleys, piping, pipe hangers, valves, gates, cocks, couplings, ells, tees, crosses, unions, nipples, plugs and reducers necessary for the operation of said factory; also one mop head, one combined wrench, two brushes, one broom, one cream rake, two butter ladles, one dipper, one coal scoop.

Said building shall be constructed and finished in substantial accordance with the specifications hereon, in a workmanlike manner, the engine and boiler and all other machinery and fixtures shall be properly set up and shall be in good running order before the party of the second part shall be required to pay for said factory.

The parties of the second part hereby agree to select and furnish suitable lands for said building, together with well, spring or reservoir on said lot for the use of the business, and it is further understood that in case the said second party shall fail to furnish said land and water within ten days after the execution of this contract, then the said Davis & Rankin at their option may select and furnish land and water in behalf and at the expense of the subscribers.

Davis & Rankin further agree to provide and keep hired, at the expense of the stockholders an experienced butter and cheese maker for one year if desired.

6 The above building is to have a capacity of handling 12,000 to 14,000 pounds of milk in a day. Said Davis & Rankin agree to erect said butter and cheese factory as set forth by the above specifications, for four thousand five hundred dollars, payable in cash when factory is completed, or one-half cash and balance in 90 days with secured notes bearing 6 % interest from date.

We, the subscribers hereto, agree to pay the above amount for said butter and cheese factory when completed. Said building to be completed within ninety days or thereabout after the above amount of $4,500.00 is subscribed. Any portion of the amount subscribed and not paid according to contract shall bear legal rate of interest.

As soon as the above amount of $4,500.00 is subscribed, or in a reasonable time thereafter, the said subscribers agree to incorporate under the laws of the State as therein provided, fixing the aggregate amount of stock not less than $4,500.00, to be divided into shares of $100.00 each. Said share or shares, as above stated, to be issued to the subscribers hereto in proportion to their paid-up interests herein, and it is herein agreed that each stockholder shall be liable only for the amount subscribed by him.

It is hereby understood that Davis & Rankin will not be responsible for any pledges or promises made by their agents or representa-

tives that do not appear in this contract and made a part thereof either in print or writing.

For the faithful and full performance of our respective parts of the above contract, we bind ourselves, our heirs, executors, administrators and assigns.

Executed and dated this 20 day of July, 1891.

DAVIS & RANKIN,
The First Party,
Per LEVI BINFORD,
Special Agent.

Names of subscribers.	No. of shares.	Amount of stock after incorporation.
Wm. W. Barber	1	100
Wm. Bevis	1	100
Edgar Coffey	1	100
Wm. Wallace Brill	1	100
H. C. Wilson	1	100
Jacob Baumunk	1	100
G. D. Coble	1	100
J. P. Ell	1	100
M. C. Moss	1	100
Emanuel Deeter	1	100
William Miller	1	100
Jayson W. Brown	1	100
J. E. Johnson	1	100
Hardy Hicks	1	100
A. J. Kauble	1	100
Henry F. Weber	½	50
Henry Schoppenhorst	½	50
Wm. M. Mitchell	½	50
J. D. Stoneburner	½	50
John C. Long	½	50
A. Baumunk	½	50
J. P. Romas	½	50
Christian Baumunk	½	50
Perry Whitecotton	½	50
R. Gantz	1	100
N. E. Baumunk	1	100
William M. Nicoson	1	100
P. O. C. Tyler	1	100
F. N. Moderitt	1	100
Perry S. Whitecotton	½	50
J. C. Coble	1	100
Geo. C. Hoffman	1	100
Jacob Fogel	1	100

COPY.

Names of subscribers.	No. of shares.	Amount of stock after incorporation.
Pat. Goggen	1	100
Lewis Backfisch	1	100
Nathan Wood	1/2	50
O. O. Van Cleve	1/4	25
Jonathan Beeson	1/4	25
Wm. Minor	1/4	25
Hiram Gilbert	1/4	25
Edwin Miller	1/4	25
S. H. Chad	1/4	25
H. H. Long	1/4	25
John Everwine	1/4	25
L. W. Gibbons	1/4	25
George Payton	1/4	25
Robert Tuttle	1/4	25
Alba Long	1/4	25
Joseph H. Hopkins	1	100
William Helton	1	100
I. N. Nicoson	1	100
Robert Davis	1	100
D. M. Barnhart	1	100
E. O. Hopkins	1	100
John C. Mitchell	1	100
Charles Siples	1	100
Jacob Mitchell	1	100
W. H. Evans	1	100
B. F. Spelbring	1	100
Levi Binford	1	100
Z. T. Barnett	1	100

Specifications for the Davis & Rankin System of Refrigerator Building.

FOUNDATION PIERS.—The foundation walls for within building are to be built of stone 16 to 18 inches thick. All piers are to be of sufficient height to form a grade from the building, and all piers are to be built of good lime and sand mortar and from 16 to 18 inches below the surface of the ground; walls to average 3 feet in height.

SILLS.—The sills are to be made of 2 x 6 plank.

JOISTS.—Joists are to be 2 x 10 inches and 16 feet long, placed 16 inches from center to center, resting on the center wall. Joists are to be well bridged.

STUDDING.—All studding are to be 2 x 4 and set 24 inches from centers; partitions as per ground plan.

COPY

RAFTERS.—Rafters for said buildings are 2 x 6 inches and placed 2 feet from center to center, with 1 x 6 braces in truss form to support the roof.

ROOF AND VENTILATORS.—The entire roofs to be covered with good quality of Star "A" Star pine shingles, laid on 6-inch sheathing; the building to be supplied with two ventilators in gable ends.

AIR CHAMBERS.—Air chambers are to be constructed in all buildings as follows: The inside of studding is lined with building paper put on up and down and nailed to studs; then nail over paper a strip $\frac{7}{8}$ x 2 inches, and with ceiling inside and siding outside it makes the air chambers necessary to the more perfect control of the temperature.

FLOORING AND CEILING.—Floors and ceiling are to be of the grade known as "C" Norway, yellow, or white pine; flooring, 4 to 6 inches wide; ceiling for office, manufacturing-room, engine-room, ice rack, cheese-curing room, and refrigerator all 4 to 6 inch, beaded.

SIDING.—Outside covered with $\frac{7}{8}$ drop-siding of quality "C" Norway or standard yellow pine.

CORNICE.—The entire building to be corniced with plain cornice, projecting about 10 inches from body of building, as per plan.

WINDOWS.—All windows to be size of glass, 12 x 26, 4 lights in sash.

DOORS.—All doors are to be of the same sizes and styles shown on drawings. Refrigerator doors are to be beveled refrigerator style, from 3 to 4 inches thick, so as to more perfectly control the temperature; inside doors, 2 feet 8 inches by 6 feet 8 inches, 4 panels; double doors, 5 x 6 8.

HARDWARE.—The building to be supplied with customary hardware, such as rim locks, bolts, hinges, and other fastenings needed for all doors and windows.

PAINTING.—Building is to be painted with two coats of paint on the outside, except the roofs.

ICE CHEST.—The cold storage to be built after the Davis & Rankin system of cold storage from water refrigerator.

DRAINS.—Floor in manufacturing-room to slope to drains, as on plans.

All material connected with the building to be good merchantable building material, as per grades above, and put together, according to the plans and specifications, in a good, substantial, and workmanlike manner.

All piping is to be complete, with all necessary globes, valves, &c. There is to be a 50-bbl. cistern and pump.

And now come the defendants Davis & Rankin and file their answer herein in the words following, to wit:

We, Davis & Rankin, the parties by that name mentioned in the complaint herein, hereby enter our appearance to said cause and say

and admit that we have no interest in the contract nor claim for damages herein sued for, the same having been assigned to the plaintiff as alleged in the complaint.

DAVIS & RANKIN,
Per THOMAS RANKIN.

And afterwards, to wit, at the May term of said court, on the 17th day of May, 1892, before the Honorable John H. Baker, one
9 of the judges as aforesaid of said court, the following further proceedings in the above-entitled cause were had, to wit:

Come the defendants except Davis & Rankin, by J. A. McNutt and George A. Knight, their attorneys, and file their joint demurrer and also their separate and several demurrers to the complaint herein; which demurrers are in the words following, to wit:

Come now the defendants (except Davis & Rankin) in the above-entitled cause and demur to plaintiff's complaint or declaration for the reasons following, to wit:

1st. Because this court has no jurisdiction over the subject-matter of this action.

2nd. Because the complaint or declaration does not state facts sufficient to constitute a cause of action against them.

JAS. A. McNUTT,
GEO. A. KNIGHT,
Att'ys for Def'ts. Demurring.

Comes now each of the defendants (except Davis & Rankin) in the above-entitled cause and each for himself separately demurs to the plaintiff's complaint or declaration and, for grounds of objection and cause of demurrer thereto, says:

First. That said complaint does not state facts sufficient to constitute a cause of action against either of them.

Second. Because said court has no jurisdiction over the subject-matter of this action.

Third. Because the court has no jurisdiction over the subject-matter of this action for the reason that the liability of said defendants is several and not joint under the contract sued on.

JAS. A. McNUTT,
GEO. A. KNIGHT,
Att'ys for Defendants Demurring.

10 And afterwards, to wit, at the May term of said court, on the 28th day of June, 1892, before the Honorable John H. Baker, one of the judges as aforesaid of said court, the following further proceedings in the above-entitled cause were had, to wit:

Come now the parties, the plaintiff by J. B. Cockrum and Shirts and Kilbourne, its attorneys, and the defendants by J. A. McNutt and George A. Knight, their attorneys, and thereupon the court, being sufficiently advised in the premises, doth now sustain the joint demurrer of the defendants to the complaint and doth also sustain the separate and several demurrer of each defendant to the complaint herein and to each paragraph of said complaint, and the

plaintiff, by its attorneys, now excepts to the ruling of the court in sustaining said demurrers and elects to stand on said complaint; whereupon the defendants move for judgment on said ruling of the court; which motion is sustained by the court.

It is therefore considered by the court that the plaintiff take nothing by its action herein and that the defendants recover of said plaintiff their costs herein expended, taxed at $8.—.

Opinion of the Court.

BAKER, *District Judge:*

The declaration is in a single count against the subscribers to a contract to recover damages for its breach. Following proper allegations as to citizenship, it is alleged in substance that on the 20th day of July, 1891, the plaintiff's assignors, Davis & Rankin, entered into a written contract with the defendants to build and equip for them a combined butter and cheese factory at Saline City, Clay county, Indiana, according to agreed plans and specifica-
11 tions; that the plaintiff entered upon the performance of the contract and expended thereunder a large sum of money for labor and material and was ready and willing to complete everything required by the terms of the contract; that the defendants refused to allow plaintiff to build and equip the factory; that the acts of the defendants were wrongful and caused damage to the plaintiff in the sum of four thousand five hundred dollars.

The parts of the contract which is made part of the declaration material to the present inquiry are as follows:

"We, Davis & Rankin, party of the first part, hereby agree with the undersigned subscribers hereto, party of the second part, to build, erect, complete, and equip for said party of the second part a combined butter and cheese factory at Saline City, Indiana."

* * * * * * *

"The parties of the second part hereby agree to select and furnish suitable lands for said building, together with well, spring, or reservoir on said lot for the use of the business, and it is further understood that in case said second party shall fail to furnish said land and water within ten days after the execution of this contract, then Davis & Rankin, at their option, may select and furnish land and water in behalf and at the expense of the subscribers."

* * * * * * *

"Said Davis & Rankin agree to erect said butter and cheese factory, as set forth by the above specifications, for four thousand five hundred dollars, payable when factory is completed, or one-half cash and balance in ninety days, with secured notes bearing six per cent. interest from date.

"We, the subscribers hereto, agree to pay the above amount for said butter and cheese factory when completed. Said building to be completed within ninety days or thereabout, after the above amount of four thousand five hundred dollars is subscribed. Any

portion of the amount subscribed not paid according to contract shall bear legal rate of interest.

"As soon as the above amount of four thousand five hundred dollars is subscribed, or in a reasonable time thereafter, said subscribers agree to incorporate under the laws of the State, as therein provided, fixing the aggregate amount of stock not less than four thousand five hundred dollars, to be divided into shares of one hundred dollars each. Said share or shares, as above stated, to be issued to the subscribers hereto in proportion to their paid-up interests herein, and it is herein agreed that each stockholder shall be liable only for the amount subscribed by him."

The defendants severally subscribed this contract for amounts varying from twenty-five dollars to one hundred dollars
12 each, as follows:

Names of subscribers.	No. of shares.	Amount of stock after incorporation.
Wm. W. Barber.....	1	$100 00

To this declaration the defendants have severally demurred on the ground that the court has no jurisdiction of the subject-matter. Whether this court has jurisdiction depends on the proper construction of the contract. If the contract of the defendants is joint the amount in controversy gives the court jurisdiction; if it is several it has no jurisdiction.

In the construction of contracts it is the duty of the court to ascertain the intention of the parties to them. When ascertained, effect ought to be given to such intention if it can be done without violating some rule of law.

"In the construction of contracts the court will look at all the circumstances of the case, the nature of the property, the occupation and relation of the parties, the usages of the place and of the business to which the contract relates, and ascertain, by reasonable inference, what the parties must have understood and mutually expected at the time of the making of the contract, and then adopt that construction which will best and most nearly carry the contract into effect as they intended and understood it." Dwelley *v.* Dwelley, 143 Mass., 509; N. E. Rep., 468.

The contract must be considered as a whole, and if, upon such consideration, the intention of the parties becomes apparent it must prevail over the literal interpretation of detached words, phrases, and clauses. Bishop on Contracts, sec. 575; Landwerlen *v.* Wheeler, 106 Ind., 523.

In this case there are sixty-one subscribers to the contract. The amount placed after each subscriber's name varies from twenty-five

dollars to one hundred dollars. Presumably they were interested
in agricultural pursuits, scattered over a considerable extent
13 of territory in Clay county, and of varying ages, habits, and
pecuniary circumstances. The amount to be raised was four thousand five hundred dollars. It is apparent from reading the contract that when one placed his name thereto for twenty-five dollars or one hundred dollars he did not intend to become solely liable for the whole four thousand five hundred dollars, and it is equally clear that the first subscriber did not intend to become liable for the amount subscribed by each additional subscriber, whoever he might happen to be. That each subscriber became liable for the payment of the amount subscribed by himself and not for the whole amount seems to me to be the plain intent of the contract. It must have been so understood by all the parties to it. I cannot persuade myself that the defendants understood the contract as making each liable for the whole amount subscribed.

The use of words of plurality, such as "We bind ourselves," will not make the contract joint when the parties engage for the performance of distinct and several duties. 1 Addison on Contracts (Am. ed. by Morgan), 86.

Here each defendant has written after his name the number of shares subscribed for by him and the amount to be paid for him therefor.

Courts ought not to permit isolated words or phrases importing a joint obligation to defeat the manifest intention of the parties as gathered from the entire contract.

In the case of Price *v.* G. R. & I. R. R. Co., 18 Ind., 137, the subscription sued on was in these words:

"We, the undersigned, promise to pay $25.00 for each share of stock set opposite each of our names."

This contract, though joint in form, was held to be several.
14 The court said: "These stock subscriptions, though, in form, joint contracts, are intended to be and are to be treated as several and each stockholder as liable simply for the amount opposite his own name."

In the case of Landwerlen *v.* Wheeler, 106 Ind., 523, the subscription was in these words: "We, the undersigned, promise to pay the following subscriptions for a new church in honor of St. Vincent De Paul, patron of the church and congregation."

This contract was construed to be several and not joint. The court said: "The paper and the manner of the subscription as clearly indicate the intention by all the parties that each subscriber should be liable, and only liable, for the amount by him subscribed as if the words 'opposite each of our names' had been used. Where a person signed the paper and put down opposite his name the amount subscribed, he just as plainly declared that that was the amount for which he was to be liable as if in the body of the paper it had been stated that each subscriber was to be liable for the amount opposite his name."

The case of Frost *v.* Williams, 50 N. W. Rep. (So. Dak.), 964, involved the construction of a contract for the erection of a butter and

cheese factory like the one at bar. It was held in a carefully prepared opinion that while the words in the body of the contract considered alone would require the contract to be construed as joint, yet, as the amount subscribed by each was written after the name of each subscriber, the contract must be construed as several.

In the case of Davis *v.* Belford, 70 Mich., 120, 37 N. W. Rep., 919, the sole question involved was whether a contract identical with the one at bar was joint or several. The court held the contract to be several and not joint.

15 In Gibbons *v.* Grinsel, 48 N. W. Rep. (Wis.), 255, a contract similar in all its essential features to the one at bar received construction. The point involved was whether the contract was joint or several. It was held that the contract was several. It is said: "The manifest purpose was that each such subscriber should thus pay the amount of his particular subscription and not that he should become liable jointly with all the other subscribers for the aggregate amount of all subscriptions. In other words, the amount which each subscriber thus agreed to pay was limited to the amount which he thus subscribed; otherwise a few responsible subscribers might be made liable for numerous irresponsible subscribers."

The fact that each subscriber has written after his name the amount subscribed by him is cogent evidence that he meant to become liable for no more. The stipulation in the contract that "it is herein agreed that each stockholder shall be liable only for the amount subscribed by him" clearly manifests the same purpose. The suggestion that this clause only relates to and fixes the liability of the stockholders *inter sese* after the organization of the corporation is untenable. Each stockholder, when the corporation was organized, without this stipulation would be liable only for the amount of stock subscribed by him. The word "stockholder" in this stipulation is to be read as "subscriber." This reading gives effect to the manifest intention of the parties and imparts legal force to the stipulation, which otherwise would have none.

I am aware that the foregoing views are in conflict with the opinion of the circuit court for the western district of Missouri in the case of Davis & Rankin *vs.* L. W. Shafer *et al.*, recently decided by Judge Phillips.

16 I have carefully examined the manuscript opinion in this case, and I find myself unable to concur in the conclusion there reached. In my judgment, the contract under consideration must be construed as several and not joint.

It is contended, however, if the contract is held to be several, that the cause of action set out in the declaration is joint, and that for this reason the court has jurisdiction. The argument is that the injury complained of is for the wilful breach of the contract caused by the joint wrong of all the defendants in preventing the plaintiff from performing the contract, and that the damages sued for spring from this joint wrong.

The argument is unsound. The cause of action is grounded on

the contract. Aside from the rights and obligations created by the contract, no cause of action would be exhibited by the declaration.

Whether the breach of the contract arose from the willful misconduct of the defendants or from their unintentional violation of it makes no difference in the rights or obligations of the parties. In either case their rights and obligations spring from and are measured by the contract. If the plaintiff has any right of action for the wrongs alleged, it arises solely from the obligation imposed on the defendants by their contract. It therefore results that the court has no jurisdiction of the subject-matter. The demurrer is sustained. Let judgment be entered accordingly.

And afterwards, to wit, at the November term, 1893, of said court, on the 16th day of February, 1894, before the Honorable John H. Baker, one of the judges as aforesaid of said court, the following further proceedings in the above-entitled cause were had, to wit:

17. Comes now the plaintiff, by George Shirts, Esq., his attorney, and files his petition for a writ of error herein in the words following, to wit:

The plaintiff respectfully petitions the court and asks that it be granted a writ of error in the above-entitled cause.

DAVIS & RANKIN BUILDING &
MANUFACTURING CO.,
By GEO. SHIRTS, *Its Attorney.*

And at the same time said plaintiff, by his said attorney, files his assignment of errors herein in the words following, to wit:

Now comes the plaintiff, Davis & Rankin Building & Manufacturing Company, and says there is manifest error in the proceedings and judgment in the above-entitled cause in this, namely:

1. The court erred in sustaining the separate and several demurrers to declaration of each of the defendants except Davis & Rankin.

2. The court erred in sustaining the joint demurrer to declaration filed by the defendants except Davis & Rankin.

3. The court erred in holding that it had no jurisdiction in this cause.

Wherefore appellant prays that the said judgment be in all things reversed.

DAVIS & RANKIN BUILDING &
MANUFACTURING COMPANY,
By GEO. SHIRTS, *Its Attorney.*

And at the same time said plaintiff, by his said attorney, files his bond herein in the penalty of five hundred dollars ($500), with George Shirts as surety thereon, which is now by the court approved, and a writ of error to the Supreme Court of the United States is now granted and allowed.

And said bond is in the words following, to wit:

Supreme Court of the United States.

Know all men by these presents that we, Davis & Rankin
18 Building and Manufacturing Company and George Shirts, are held and firmly bound unto the above-named appellees in said cause No. 8744 in the sum of five hundred dollars, to be paid to said appellees; to which payment, well and truly to be made, we bind ourselves, jointly and severally, and our and each of our heirs, executors, and administrators, jointly by these presents.

Sealed with our seals and dated this 16th day of February, 1894.

Whereas the above-named Davis & Rankin Building & Manufacturing Company hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the circuit court of the United States for the district of Indiana:

Now, therefore, the condition of this obligation is that if the above-named Davis & Rankin Building & Manufacturing Company shall prosecute its said writ of error to effect and answer all costs and damages that may be adjudged or awarded against it if it shall fail to make good its plea, then this obligation to be void; otherwise in full force.

DAVIS & RANKIN BUILDING AND
MANUFACTURING COMPANY. [SEAL.]
GEORGE SHIRTS. [SEAL.]

Taken and approved by me this 16th day of Feb., 1894.

JOHN H. BAKER, *Judge*.

19 UNITED STATES OF AMERICA, } ss.:
District of Indiana, }

I, Noble C. Butler, clerk of the circuit court of the United States within and for the district aforesaid, do hereby certify that the above and foregoing is a full, true, and complete transcript of the record in the cause of Davis & Rankin Building & Manufacturing Company against William W. Barber and others as fully as the same remains upon the records now in my office.

Seal Circuit Court of the United States, District of Indiana. Witness my hand and the seal of said court, at Indianapolis, in said district, this 5th day of April, A. D. 1894.

NOBLE C. BUTLER, *Clerk*.

Endorsed on cover: Case No. 15,702. Indiana C. C. U. S. Term No., 818. The Davis & Rankin Building & Manufacturing Company, plaintiff in error, *vs.* William W. Barber *et al.* Filed October 11, 1894.

Office Supreme Court, U. S.
FILED.
FEB 16 1895
JAMES H. McKENNEY,
CLERK.

(15,702)

Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 818.

THE DAVIS & RANKIN BUILDING AND MANUFACTURING COMPANY,
Plaintiff in Error,

vs.

WILLIAM W. BARBER *et als.*
Defendants in Error.

In error to the Circuit Court of the United States for the District of Indiana.

Motion of defendants in error to dismiss writ of error for want of jurisdiction, and brief in support of said motion.

GEO. A. KNIGHT,
Attorney for Defendants in Error,
Brazil, Ind.

J. A. McNUTT,
of Counsel,
Brazil, Ind.

WM. B. BURFORD, PRINTER, 76 S. ILLINOIS ST., INDIANAPOLIS.

IN THE

Supreme Court of the United States.

No. 818.

OCTOBER TERM, 1894.

DAVIS & RANKIN BUILDING AND MANUFACTURING COMPANY,
Plaintiff in Error,

vs.

WILLIAM W. BARBER, WILLIAM BEVIS, EDGAR COFFEY, WILLIAM WALLACE BRILL, H. C. WILSON, JACOB BAUMUNK, G. D. COBLE, J. P. ELL, M. C. MOSS, EMANUEL DEETER, WILLIAM MILLER, JASON W. BROWN, J. E. JOHNSON, HARDY HICKS, A. J. KAUBLE, HENRY F. WEBER, HENRY SCHOPPENHORST, WILLIAM M. MITCHELL, J. D. STONEBURNER, JOHN C. LONG, A. BAUMUNK, J. P. ROMAS, CHRISTIAN BAUMUNK, PERRY WHITECOTTON, E. GANTZ, N. E. BAUMUNK, WILLIAM M. NICOSON, P. O. C. TYLER, F. N. MODESITT, PERRY S. WHITECOTTON, J. C. COBLE, GEORGE C. HOFFMAN, JACOB FOGLE, PAT GOGGEN, LEWIS BACKFISH, NATHAN WOOD, O. O. VANCLEVE, JONATHAN BEESON, WILLIAM MINOR, HIRAM GILBERT, EDWIN MILLER, S. H. CHAD, H. H. LONG, JOHN EVERWINE, L. W. GIBBONS, GEORGE PATON, ROBERT TUTTLE, ALBA LONG, JOSEPH H. HOPKINS, WILLIAM HELTON, I. N. NICOSON, ROBERT DAVIS, D. M. BARNHART, E. O. HOPKINS, JOHN C. MITCHELL, CHARLES SIPLES, JACOB MITCHELL, E. H. EVANS, H. F. SPELBRING, LEVI BINFORD, Z. T. BARNETT, and DAVIS & RANKIN,
Defendants in Error.

Case No. 15,702.

Motion to dismiss writ of error for want of jurisdiction.

Come now the defendants in error (except Levi Binford and Davis & Rankin), by their Counsel appearing in that behalf and move the Court to dismiss the writ of error in the above entitled cause for want of jurisdiction, because under the Act of Congress of March 3, 1891 (26 Stat. 826, Ch. 517), creating United States Circuit Courts of Appeals, the United States Circuit Court of Appeals for the Seventh Circuit has jurisdiction of said writ of error to the exclusion of this Court, for the reasons following:

First: Because it is not shown by the record in this cause that the question of *jurisdiction alone* has been certified to this Court.

Second: Because the *whole case* is certified to this Court, and the record involves and the assignment of error presents, *other* than the jurisdictional question for the determination of this Court.

Third: Because the plaintiff in error has not elected to take its writ of error to this Court upon the question of the jurisdiction of the Court below *alone*, but has taken its writ of error upon the *whole case*, in which is involved other than the jurisdictional question, the question of the sufficiency of the complaint, to state a cause of action, for want of facts, of which last above mentioned question, the United States Circuit Court of Appeals has exclusive appellate jurisdiction under the Act of Congress hereinbefore referred to.

Fourth: Because, a writ of error, taken in a cause which involves other than jurisdictional questions, must if the *whole case* is certified, be taken to the United States Circuit Court of Appeals, which Court may, if it

deem proper, certify the question of jurisdiction to this Court.

Fifth: Because the writ of error was not sued out within one year after the entry of the judgment herein sought to be reviewed, the judgment having been entered on June 28, 1892, and the writ of error not having been applied for until February 16, 1894.

GEO. A. KNIGHT,
Attorney for Defendants in Error.
Brazil, Ind.

JAS. A. MCNUTT,
of Counsel for Defendants in Error.
Brazil, Ind.

BRIEF OF DEFENDANTS IN ERROR, IN SUPPORT OF FOREGOING MOTION TO DISMISS WRIT OF ERROR.

May it please the Honorable Court:

The question involved in the foregoing motion is, has this Court jurisdiction of this writ of error? We insist on behalf of the defendants in error that it has not, and we will as briefly as possible submit our views in support of our contention.

The Act of March 3, 1891, creating United States Circuit Courts of Appeals (26 Stat. 826, Ch. 517) provides—in Sec. 5—that appeals or writs of error may be taken from the District Courts or from existing Circuit Courts direct to the Supreme Court; "in any case in "which the jurisdiction of the Court is in issue; in such "cases the question of jurisdiction *alone* shall be certified to the Supreme Court from the Court below for "decision." By Section 6 of the Act, the Circuit Courts of Appeals have appellate jurisdiction to review final decisions of the lower Courts in all cases other than those provided for in Section 5.

This Court in McLish vs. Roff, 141 U. S., 661, 668, has declared the proper construction of this Act to be, that the party against whom the judgment is rendered "must elect whether he will take a writ of error or "appeal to the Supreme Court upon the question of jurisdiction *alone*, or to the Circuit Court of Appeals "upon the *whole case*: if the latter, then the Circuit

"Court of Appeals *may, if it deem proper, certify the* "*question* of jurisdiction to this Court." This decision has been followed in the following cases:

Crabtree *vs.* Madden, C. C. A., 54 F., 426;

Same *vs.* Byrne, *id.*, 432;

American Sugar Refining Co. *vs.* Johnson, 60 F., 503. 9 C. C. A., 110;

Same *vs.* Tatum, 60 F., 514. 9 C. C. A., 121;

Barling *vs.* Bank of British North America, Cir. Ct. App., 50 Fed., 260.

Schunck *vs.* Moline, Millburn & Stoddard Co., 13 S. Ct., 416, 147 U. S., 500.

At this point we desire parenthetically to state that this case was taken by writ of error to the United States Circuit Court of Appeals for the Seventh Circuit and was dismissed for want of jurisdiction. Jenkins J., in the opinion of the Court dismissing the writ of error for want of jurisdiction, *inter alia*, said, "The "Act thus construed (referring to the decision of this "Court in McLish *vs.* Roff, 141 U. S. 661, 668), mani- "festly contemplates that when a case is brought to the "Circuit Court of Appeals, there shall be something for "the Court to review, aside from the question of the ju- "risdiction of the Court below. Here the plaintiff upon "the sustaining of the demurrer (to the complaint) re- "fused to plead anew, and elected to stand upon its "complaint, and final judgment was rendered dismissing "the action. The only question therefore, presented by "the record, goes to the jurisdiction of the Court below. "In such case a review of the determination of that "question can only be had in the Supreme Court." See 60 F, 465. 9 C. C., A. 79.

In this conclusion we dissent from the opinion of Jenkins J. for this reason, that it is based upon a clear misconception of the questions involved in the record

of the case. The record and the assignment of errors present *two questions*, namely: Whether the complaint stated facts sufficient to constitute a cause of action; and whether the Court below had jurisdiction of the subject matter of the action. Both of these causes constitute separate and distinct grounds of demurrer to the complaint under the Indiana Statute, which reads as follows:

"The defendant may demur to the complaint when "it appears upon the face thereof, either

"*First*. That the Court has no jurisdiction of the "person of the defendant, or the subject of the action."

"*Second*. * * * * * * * *

"*Third*. * * * * * * * *

"*Fourth*. * * * * * * * *

"*Fifth*. That the complaint does not state facts sufficient to constitute a cause of action."

"*Sixth*. * * * * * * * *

See Rev Stat. of Indiana (1881), p. 62, Sec. 339.

The demurrer to the complaint in the case at bar assigns two causes why it is insufficient, namely:

First. Want of facts.

Second. Want of jurisdiction of subject of the action (see Rec. p. 10), for joint and several demurrers.

The error assigned in the Circuit Court of Appeals as in this Court, was the sustaining of the demurrers, (joint and several) to the complaint. So we say that when, in the opinion of Jenkins J. dismissing the writ of error, he said. "The only question, therefore, pre-"sented by the record, goes to the jurisdiction of the "Court below," he was mistaken and his opinion was based upon an erroneous statement of the contents of

the record before him, which contained the question of the insufficiency of the complaint "*for* want of facts," as well as the question of want of jurisdiction of the subject of the action; and that for this reason he was in error in dismissing the writ. Over the ground of demurrer "want of jurisdiction" the Circuit Court of Appeals has no appellate jurisdiction, and if this were the *only* question presented by the record that Court would have rightly dismissed the writ of error; but over the other ground of demurrer, "want of facts," it did have appellate jurisdiction, and both questions were before it for decision. Now what was the duty of the Circuit Court of Appeals, when confronted with a record containing these two questions? We answer, under the decision in McLish *vs.* Roff and the other cases, *supra*, the whole case being before the Circuit Court of Appeals, it could, if it deemed it proper to do so, certify the question of jurisdiction to this Court and await its decision upon it; but it did not do so—it dismissed the writ of error, as we claim wrongfully, "for want of juris-"diction."

If but one ground of demurrer to the complaint had been assigned, namely: "Want of facts to constitute a "cause of action," undoubtedly the Circuit Court of Appeals would have exclusive appellate jurisdiction of the case. The fact that two grounds of demurrer are assigned, one "want of facts" and the other "want of juris-"diction," does not deprive the Circuit Court of Appeals of jurisdiction, because it may, if it deem it proper, certify the question of jurisdiction to this Court. These two questions are embraced in the one demurrer and if the writ of error is taken as to the whole case, it must be taken to the Circuit Court of Appeals and not to this Court, because it embraces other, as well as jurisdictional questions.

In Texas & P. R. R. Co. vs. Bloom, 60 Fed. 979, 9 C. C. A., 300, it was held, that "A Circuit Court of Ap- "peals has jurisdiction of a case in which the jurisdic- "tion of the Court below is in issue, or which involves "the construction or application of the Federal Constitu- "tion (Act March 3, 1891 sec. 5), *if other questions are "also involved.*" This case, it seems, settles this contro- versy in favor of the defendants in error, and it is, as we understand it, in perfect harmony with the decision of this Court in McLish vs. Roff, *supra*, and the other cases hereinbefore cited which follow that case.

Again, in Maynard vs. Hecht, 14 S. Ct., 353., 151 U. S. 324; Moran vs. Hagerman, 14 S. Ct., 354, 151 U. S. 329, it was held, that "A formal certificate of 'the "'question of jurisdiction' is an *absolute prerequisite* to a "review by the Supreme Court of a cause brought "directly from the Circuit Court on the ground that the "jurisdiction of the court was in issue under Section 5 "of the judiciary act of March 3d, 1891."

There is no "formal certificate of the question of "jurisdiction" to be found in the record of this case. The whole case is here on writ of error, and according to the above syllabus of the cases cited it is improperly here and not in the form required by these decisions and the judiciary act referred to; the formal certifica- tion of the jurisdictional question, *ahoc*, to this Court, direct from the Circuit Court, being the essential prere- quisite to a review of such question by this Court. This has not been done, and because it has not, our motion to dismiss ought, as we think, to be sustained

In no other way under the Act of March 3, 1891, can a writ of error be prosecuted in such a case as this, without encountering the difficulties suggested by this

Court in the case of McLish *vs.* Roff, *supra*, unless the writ of error is taken from the Circuit Court to this Court, upon the question of jurisdiction alone. In the language of the Act above referred to "the question of "jurisdiction alone shall be certified to the Supreme "Court from the Court below for decision."

In the case at bar, as we understand the record, the writ of error is taken upon the whole case, and not upon the question of jurisdiction alone, as the only error assigned here is upon sustaining the demurrers of the defendants to the complaint, which demurrers, as we have already stated, assign two separate and distinct causes why the complaint is insufficient; one of which is want of facts, and the other, want of jurisdiction. If the question of jurisdiction alone were certified to this Court, our objection would not be well taken, because of that separate and independent question this Court has exclusive jurisdiction; but here, in the case at bar, both questions are embraced in the record and presented under the assignment of errors; the whole case is here, and of so much of it as raises the question "that the "complaint does not state facts sufficient to constitute a "cause of action," this Court, we claim and insist, has no jurisdiction; and the only way in which it can acquire jurisdiction—when other than jurisdictional questions are involved in the record—is by taking a writ of error to the Circuit Court of Appeals upon the *whole case*, and that Court, if it deem it proper, may certify the question of jurisdiction to this Court, and the Court of Appeals may hold the case in abeyance until this Court passes upon and determines the jurisdictional question, and if overruled, the Court of Appeals may determine the *other* question involved in the record, and thus, by this method of procedure, the whole case and all the

questions involved may be determined through the agency or medium of the Circuit Court of Appeals; and thus may be avoided the necessity of taking writs of error to separate Appellate Courts in one and the same case, thereby obviating the difficulties suggested by this Court in McLish *vs.* Roff, *supra*.

In other words and to further illustrate our position, when this "whole case" was taken to the Circuit Court of Appeals on writ of error, that Court, if it deemed it proper to do so, might have certified to this Court the question of jurisdiction, and if the decision of this Court upheld the jurisdiction of the Cirtuit Court, then the Court of Appeals would have been bound to decide the other question in the record, namely, "Did the com-"plaint state facts sufficient to constitute a cause of "action?" and in this way a decision would have been reached and announced upon the merits of all the matters involved in the controversy.

On the other hand, if, upon a certification of the question of jurisdiction to this Court, it should hold that the Circuit Court had no jurisdiction of the subject of the action, then the Circuit Court of Appeals would not have been required to pass upon any other question involved in the record, and the decision of the Circuit Court, holding it had no jurisdiction, would simply have been affirmed by the Court of Appeals and this would have ended the attempted litigation of the matters in controversy, so far as the Federal Courts were concerned.

If we are right in our construction of the Act of March, 1891, *supra*, and are not mistaken in our interpretation of the decisions in the case of McLish vs. Roff, *supra*, and the other cases cited, following it, then we

think it clear this Court has no jurisdiction of this case as it is here presented by the record and the errors assigned; and we respectfully pray the Court to dismiss the writ of error for want of jurisdiction to entertain it.

We desire, in addition to what we have said, to offer a suggestion in support of the fifth reason in our motion to dismiss the writ of error:

The fifth reason is based upon the failure of plaintiff in error to sue out its writ of error within *one year* from the date of the entry of the judgment in the Court below. The judgment was rendered on the 28th day of June, 1892 (see Rec. pp. 10, 11). The application for the writ of error was made on the 16th day of February, 1894 (see Rec. p. 15), and the writ was issued on the same day it was applied for (see Rec. pp. 1, 2). The record was not filed in the Clerk's office of this Court until October 11, 1894. Under Sec. 6 of the Act of March 3, 1891, after declaring the class of cases of which the Circuit Courts of Appeals has jurisdiction, it is provided, that: "In all cases not hereinbefore in this sec-"tion made final, there shall be of right an appeal or "writ of error or review of the case by the Supreme "Court of the United States where the matter in contro-"versy shall exceed one thousand dollars besides costs. "*But no such appeal shall be taken or writ of error sued out* "*unless within one year* after the entry of the order, judg-"ment or decree sought to be reviewed."

Under this Act (Sec. 5) this Court has jurisdiction, in any case in which the jurisdiction of the Court below is in issue—"in such cases the question of jurisdiction "*alone* shall be certified to the Supreme Court from "the Court below for decision."

Heretofore, in this brief, we have contended that, in as much as the question of jurisdiction *alone* is not cer-

tified to this Court, but the *whole case* is brought here which involves other than the jurisdictional question, this Court has no jurisdiction of the writ of error. If this Court should not deem this position well-taken or tenable, but should conclude that it has jurisdiction of the question of jurisdiction of the Court below of the subject of the action, and that the case is properly certified to this Court, then we insist that the fifth reason, in our motion to dismiss, namely, because the writ of error was not sued out until long after the expiration of the year from the entry of the judgment, is well grounded, and the writ of error should be dismissed.

If this Court acquires jurisdiction under the Act of March 3d, 1891, of this cause, and it undoubtedly does, as we think, if it has jurisdiction at all, then it must take it upon the terms, conditions and limitations imposed by this Act; and one of these conditions is, that the writ of error must be sued out within "*one year after* "*the entry of the judgment sought to be reviewed.*"

If the jurisdictional question were not involved in the record of this cause it assuredly belongs to that class of actions over which the Circuit Courts of Appeals have exclusive and final jurisdiction under the Act of March 3, 1891; and if, because the question of jurisdiction is involved, the Act referred to gives the Supreme Court of the United States jurisdiction to determine that question, it must be conferred by a writ of error sued out, as expressly provided in the Act, "within one year from the "entry of the judgment sought to be reviewed."

So upon this branch of the motion to dismiss we think this Court has no jurisdiction of this case, because

the writ of error was not sued out within the time required by law.

We have been assuming that the time, "one year," is to be computed from date of entry of judgment to the date when the writ of error was applied for, and not from date of entry of judgment to the date when the record was filed in this Court, which was more than *two years* after the entry of judgment in the Court below. Either method of computation would extend the time beyond which this Court could entertain jurisdiction of this writ of error.

We would respectfully ask the Court to dispose of this motion, first; as, if it is sustained, considerable labor will be saved in preparing briefs upon the merits of the controversy. For this reason, we respectfully request that this motion be not postponed, but that it be disposed of at an early day, so that Counsel may know whether any preparation for argument upon the merits of the controversy will be necessary.

We hope this request will not be regarded as impertinent, as we only make it to save further labor and expense in the cause.

In conclusion, we respectfully submit the motion to dismiss writ of error, to the consideration of the Court.

GEO. A. KNIGHT,
Attorney for Defendants in Error,
(Except Binford and Davis and Rankin),
Brazil, Ind.

J. A. MCNUTT,
of Counsel,
Brazil, Ind.

COPY OF NOTICE OF MOTION TO DISMISS WRIT OF ERROR.

To L. T. Michener Esq, Washington D.C.

Attorneys for Plaintiff in Error:

Please take notice, that on Monday, the 23d day of March A. D., 1895, at the opening of the Court, or as soon thereafter as counsel can be heard, the motion of which the above and foregoing is a copy, will be submitted to the Supreme Court of the United States for the decision of said Court thereon. Annexed hereto is a copy of the brief of argument to be submitted with the said motion in support thereof.

GEO. A. KNIGHT,

Attorney for Defendants in Error.

(NOTE:—Proof of the service of above notice and motion, and delivery to Attorneys of Plaintiff in error, of copy of foregoing brief in support thereof, is filed with this motion in the Clerk's Office of this Court, as required by the rules of this Court.)

Office Supreme Court, U. S.
FILED.
MAR 14 1895
JAMES H. McKENNEY,
CLERK.

(15,702)

Supreme Court of the United States

OCTOBER TERM, 1894.

No. 818.

THE DAVIS & RANKIN BUILDING AND MANUFACTURING COMPANY,
Plaintiff in Error,

vs.

WILLIAM W. BARBER, *et al.*,
Defendants in Error.

In error to the Circuit Court of the United States for the District of Indiana.

Brief of Plaintiff in Error on Motion to dismiss Writ of Error.

L. T. MICHENER,
Attorney for Plaintiff in error,
Washington, D. C.

GEORGE SHIRTS,
of Counsel,
Noblesville, Ind.

TRIBUNE, NOBLESVILLE, IND.

(13,702)

Supreme Court of the United States

OCTOBER TERM, 1894.

No. 818.

THE DAVIS & RANKIN BUILDING AND MANUFACTURING COMPANY,
Plaintiff in Error,

vs.

WILLIAM W. BARBER, *et al.*
Defendants in Error.

In error to the Circuit Court of the United States for the District of Indiana.

Brief of Plaintiff in Error on Motion to dismiss Writ of Error.

L. T. MICHENER,
Attorney for Plaintiff in error.
Washington, D. C.

GEORGE SHIRTS,
of Counsel.
Noblesville, Ind.

Plaintiff's Brief on Motion to Dismiss Writ of Error.

I.

The defendant argues that the jurisdiction of this case rests in the Circuit Court of Appeals for the seventh circuit.

Under the authority of McLish *v.* Roff, 141 U. S., 661, the plaintiff sued out this writ of error to the Circuit Court of Appeals for said seventh circuit, upon the contention that there was more involved in this record than the question of jurisdiction alone.

In the latter court it was held that the only question presented by the record was that of the jurisdiction of the Circuit Court of the United States for the District of Indiana.

60 F. 165.

By this decision the defendant, as well as the plaintiff, was bound.

It became the law of the case, and, whether the decision was correct or not, it was alike conclusive on both parties.

It would certainly be anomalous to say that, the Circuit Court of Appeals having decided that it had no jurisdiction and that the case was triable only in the Supreme Court, to now say we cannot try it in the Supreme Court for want of jurisdiction. That would be to say that a writ of error could not be taken in this case at all—for at all events there are only two courts to which this case might be taken: one to the ~~Supreme~~ Circuit Court of Appeals and the other to this court.

Having been denied admission to the Circuit Court of Appeals, we insist that the question is no longer open for discussion so far as this case is concerned, and that this question for the purposes of this case has been put at rest by the decision of the Circuit Court of Appeals.

II.

The record in this case presents only the question of jurisdiction, for the reason that that was the sole question decided by Judge Baker in the Circuit Court of the United States for the District of Indiana.

Davis & Rankin *v.* Barber, 60 F. 465.

It is true that the demurrers in the record contained a specification for want of facts; but in as much as the Circuit Court decided only upon the question of jurisdiction, for the purposes of this case, the writ of error presents only that question.

III.

The defendant in error further claims that this court has no jurisdiction, for that this writ fo error was not sued out within one year from the date of the entry of judgment.

This contention is based upon Section 5 of the Circuit Court of Appeals Act of March 3, 1891, and upon the following clause thereof: "*But no such appeal shall be taken or writ of error sued out unless within one year after the entry of the order, judgment, or decree sought to be reviewed.*"

But that provision applies only to appeals on writs of error where the object is to review in this court the decision of the Circuit Court of Appeals, in cases, where by the statute, the decision of this last named court is not final.

Such provision has no reference whatever to a case wherein the judgment of the Circuit Court is sought to be reviewed directly in the Supreme Court.

In all cases, involving jurisdiction alone, the decision of the Circuit Court can only be reviewed by the Supreme Court.

Section 5 of said Appellate Court Act does not fix the time within which an appeal or writ of error must be taken or sued out.

In discussing the jurisdiction of the Supreme Court, under this statute, Curtis, in "Important

Federal Statutes," page 148, says: "The period within which an appeal or writ of error in the classes of cases enumerated in Section 5 of the Appellate Courts Act can be sued out is not fixed by that statute *and is doubtless the same as before its passage; that is to say the period is in general two years.*"

R. S., Sec. 1008.

II.

The record in this case shows that the judgment sought to be reviewed was rendered on the 28th day of June, 1892.

Transcript, page 10.

On the 16th day of February, 1894, the plaintiff in error filed its petition for a writ of error in this cause, together with its assignment of errors and bond, which bond the court approved and granted the writ.

And on the 14th day of April, 1894, the citation was duly issued and service thereof acknowledged by the attorney for the defendants in error. The writ was properly sued out and within the time required by law.

2 Foster's Fed. Prac., Sec. 484.

Radford *v.* Folsom, 123 U. S., 725.

Stafford *v.* Union Bank, 16 How., 135.

Mesa *v.* U. S., 2 Black, 721.

It is respectfully asked that the motion to dismiss be overruled.

L. T. Michener,
Attorney for Plaintiff in Error.

George Shirts,
Of Counsel.